

[NOT SCHEDULED FOR ORAL ARGUMENT]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NEW JERSEY, *et al.*,  
Plaintiff-Appellants,

v.

MARTIN J. WALSH, *et al.*,  
Defendants-Appellees;

PUBLIC CITIZEN HEALTH RESEARCH, *et al.*,  
Plaintiff-Appellants,

v.

MARTIN J. WALSH, *et al.*,  
Defendants-Appellees.

Nos. 21-5016, 21-5018  
(consol.)

**MOTION TO CONTINUE ABEYANCE**

Pursuant to this Court's order of December 1, 2022, the government respectfully requests that this Court continue to hold these cases in abeyance for at least an additional 45 days, until Monday, February 27, 2023. The comment period for the relevant NPRM closed on June 30, 2022, and the agency is now actively working on finalizing the rulemaking. The agency aims to conclude the rulemaking process by June 30, 2023, pending successful

completion of interagency review. This represents a minor change in the rulemaking timeline since the last motion filed by the government, which indicated that the agency intended to conclude the rulemaking process by March 31, 2023. Counsel for public health organization plaintiffs has indicated they oppose such an extension of the abeyance period. Counsel for the state plaintiffs has indicated they take no position on this motion or the motion to set a briefing schedule filed by the public health organization plaintiffs.

1. The Occupational Safety and Health Administration (OSHA), a component of the Department of Labor, requires qualifying employers to record work-related injuries and illnesses on three standardized forms: Forms 300, 301, and 300A. *See* Dkt. No. 28 at 1. In May 2016, OSHA issued a new rule requiring certain of these employers to submit the data from these forms electronically each year. *Id.* Prior to this new rule, employers kept this data on-site to be collected during an on-site inspection or as part of a broader industry survey. *Id.* at 2. Before the first filing deadline, OSHA announced that it was partially rescinding the rule and would only require submission of Form 300A. *Id.* Two sets of plaintiffs—one, a group of public health organizations and the other a group of States—challenged the lawfulness of the rescission. *Id.*

2. On January 11, 2021, the district court issued its opinion upholding the agency's action. Plaintiff-Appellants filed a notice of appeal.

3. On February 26, 2021, the government sought to place the appeal in abeyance while new agency officials re-evaluated the issues underlying the case. On April 9, 2021, this Court granted the request for abeyance for 60 days and ordered the parties to file additional motions by June 8, 2021. On June 9, 2021, this Court granted the government's request to continue abeyance for an additional 30 days. On July 12, 2021, this Court granted the government's request to continue abeyance through January 3, 2022 in light of the agency's announcement that OSHA intended to issue a proposal to restore the provisions whose rescission were challenged in this suit by December 31, 2021.

4. In its November 9, 2021 status report, the government reported that OSHA had submitted a draft NPRM to the Office of Information and Regulatory Affairs (OIRA) pursuant to Executive Order 12866 and that the Department of Labor still intended to publish the Notice of Proposed Rulemaking by December 31, 2021. Unfortunately, the agency was unable to achieve that goal as the period of review for OIRA was extended through January. The government requested continued abeyance through February 14, 2022. Plaintiff-Appellants Public Citizen Health Research Group, American

Public Health Association, and Council of State and Territorial Epidemiologists moved for this Court to set a briefing schedule.

5. Because the review process for OIRA took longer than the agency expected, the agency renewed its request for abeyance on February 15, 2022, and plaintiffs opposed. On March 31, 2022, this Court denied the motion for continued abeyance.

6. On March 30, 2022, OSHA published the Notice of Proposed Rulemaking. The NPRM proposed to require establishments with 100 or more employees in certain designated industries to electronically submit information from their OSHA Forms 300, 301, and 300A to OSHA once a year.<sup>1</sup> In addition, under the NPRM, establishments with 20 or more employees in certain industries would continue to be required to electronically submit information from their OSHA Form 300A annual summary to OSHA once a year. The proposed rule would also remove the current requirement for establishments with 250 or more employees, not in a designated industry, to electronically submit information from their Form 300A to OSHA on an annual basis.<sup>2</sup>

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<sup>1</sup> <https://www.regulations.gov/document/OSHA-2021-0006-0006>.

<sup>2</sup> The NPRM also proposed to update the classification system used to determine the list of industries covered by the electronic submission requirement and to require establishments to include their company name when making electronic submissions to OSHA.

7. In light of the issuance of the Notice of Proposed Rulemaking, this case has been in abeyance since April 14, 2022. The comment period for the NPRM closed on June 30, 2022, and the agency is now actively working on finalizing the rulemaking. The government respectfully requests that the Court continue to hold the cases in abeyance for at least an additional 45 days, until February 27, 2023, while the rulemaking process is ongoing. The agency aims to conclude the rulemaking process by June 30, 2023, pending successful completion of interagency review. This represents a minor change in the rulemaking timeline since the last motion filed by the government, which indicated that the agency intended to conclude the rulemaking process by March 31, 2023. Given the potential for the completion of the rulemaking process to resolve the Plaintiffs' claims in the near future, the government does not believe it would serve the interest of judicial economy to move forward with briefing at this time.

8. Counsel for public health organization plaintiffs has indicated they oppose such an extension of the abeyance period. Counsel for the state plaintiffs has indicated they take no position on this motion or the motion to set a briefing schedule filed by the public health organization plaintiffs.

Respectfully submitted,

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JANUARY 2023

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**CERTIFICATE OF COMPLIANCE**

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(1)-(2) because it contains 954 words. This motion also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

*/s/ Laura E. Myron*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2023, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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